

Roles and Responsibilities of the ZBA

Paul G. Sanderson, Esq.

Staff Attorney

Local Government Center

Chris Northrop

Senior Planner

Office of Energy and Planning

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There is a huge amount to learn:

- RSA 673:1, IV, every zoning ordinance must include provision for a ZBA.
- Failure to include provision for a ZBA will render a zoning ordinance invalid.
 - Jaffrey v. Heffernan, 104 NH 249 (1962)

A constitutional “safety valve”

- The federal and state constitutions prohibit the taking of private property for public use without just compensation.
 - US Const. 5th amd, NH Const. Pt. 1 Art 2 & 12
- The ZBA prevents the ordinance from unconstitutionally taking the economic value of land (“**inverse condemnation**”), through its power to vary from the ordinance.

When is ZBA Relief Not Needed?

(Each of these a seminar in itself)

- **Non-conforming uses or structures** that predate the passage of the ordinance provision, i.e. “grandfathering”.
- **Governmental uses** that do not conform to the ordinance, subject to RSA 674:54.
- Uses allowed because a federal or state law expressly or impliedly ***preempts*** the local ordinance.

The ZBA Has No Legislative Powers

- The ZBA takes local land use documents as they exist, and does not change them.
 - Master Plan
 - Zoning ordinance
 - Subdivision & Site Review regulations
 - Created by planning board, citizen petition, or governing body, and adopted by town meeting or the city or town council.

The ZBA Has No Executive Powers

- These decisions are not made by the ZBA:
 - Building Inspector or the Selectmen:
 - Building permits
 - Enforcement of ordinances
 - Building code decisions
 - Legislative body:
 - Road classification and acceptance
- Yet, every one of these can potentially involve the ZBA in an appeal of the underlying decision.

The ZBA is a Quasi-Judicial Body

- The ZBA collects **evidence**, finds the facts, and applies legal tests to determine if relief from the ordinance should be granted.
- It **interprets** the ordinance and has the final say on the ***meaning*** of the language.
- It **perfects** the ordinance through its power to **overrule or modify** decisions of administrative officials.

Jurisdiction

- RSA 674:33:
 - Administrative appeal
 - Variances, and special exceptions
- RSA 674:33-a: Equitable Waiver of Dimensional Requirements
- RSA 674:34: Building Code Appeals
- RSA 674:41: Class VI or private road
- RSA 236:118: Junkyard certificate of location approval

The Process of Adjudication

- Constitutionally required minimum safeguards:
 - Notice to affected persons of a proposed action
 - An opportunity to be heard at a public hearing
 - Decision by an impartial tribunal
 - Ability to appear and speak through counsel
 - Deliberation based upon evidence and facts
 - A written decision with reasons

“Procedural Due Process”

- Notice to all affected parties:
 - See RSA 676:7, Five days prior to hearing by certified mail and newspaper ad
 - Applicants may not change their request for the type of relief during hearing; i.e. A special exception cannot become a variance
- An opportunity to be heard personally or through counsel

N.H. Statute & Due Process

- Notice to affected persons
 - RSA 676:7, I (a)
- Opportunity to be heard at a public hearing, to appear and speak through counsel;
 - RSA 676:7, I and III
- Decision by an impartial tribunal
 - RSA 673:14
- Deliberation based upon evidence and facts
 - RSA 674:33 and RSA 91-A
- A written decision with reasons;
 - RSA 676:3

Who is sitting on this case?

- The 5 regular members shall sit unless disqualified, or absent.
- An alternate member, selected by the Chairperson, may sit for each ***disqualified*** or ***absent*** member, RSA 673:11.
- An alternate may not fill a seat that is ***vacant***, i.e.. death or resignation.

The Board's Procedural Rules

- All land use boards are required to have rules of procedure by RSA 676:1.
- No specific set of rules is mandated, no mention of “Robert’s Rules”, see examples at OEP website and RPC websites.
- Assists members in treating similar cases in similar ways, and in the seating of alternates.

Conflicts of Interest

- RSA 673:14, member prohibited from sitting if:
 - Direct personal or pecuniary interest in the outcome; or
 - Disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.
- Any board member can ask for a *non-binding* vote on whether he or she, or any other member, is disqualified in a case.
- Members must disqualify themselves, a board cannot vote a member off.

Conflicts of Interest

- Conflicts arise in six situations:
 - Prejudgment
 - Abutters
 - Financial interest in the outcome
 - Employment
 - Family relations
 - Other relations

Prejudgment

- Atherton v. Concord, 109 N.H. 164 (1968). The mere fact that the planning board member voted in favor of the project, did not disqualify him from voting on the same project as a member of the city council.
- Winslow v. Holderness Planning Board, 125 N.H. 262 (1984). A member was disqualified where, prior to his position on the planning board, he had spoken in favor of a project at a public hearing on a subdivision application in his private capacity.

Family Relations

- In an application before the planning board, there was no bias on the part of a board member when:
 - His spouse was leading proponent against project.
 - The member came to the board with a memorandum detailing the reasons to deny the application.
 - Webster v. Candia, 146 N.H. 430 (2001).

What to Do?

- Local officials should reveal any conflict to the parties at the earliest possible time:
 - If nobody objects at that time, they may have waived their right to object later.
 - Fox v. Town of Greenland, 151 NH 600 (2004)
- When in doubt, step down.
- Consider a local conflict of interest ordinance or a board ethics policy, RSA 31:39-a.

Role of Alternate Members

- Somewhat controversial, see plan-link.
- We advise that they not sit with the board during hearings, and not participate in deliberations. May ask questions, make observations, as would any other participant.
- Others believe they should be with the board, and participate in all discussions, but not make motions, or cast a vote.

Quorum of the Board

- The concurring vote of 3 members of the board needed to decide in favor of an applicant or petitioner. RSA 674:33, III.
 - Does an applicant have a due process right to be heard by a full board of 5?
 - Is a decision by less than 5 members a reason for a rehearing?
 - Does an appointing authority have a duty to fill vacancies to make a full board?

Clues, but no definite answer

- ZBA member missed some hearings on complex case, and voted. Abutters failed to object before vote: Held: member not disqualified.
 - Fox v. Town of Greenland, 151 NH 600 (2004)
- PB member missed meetings and voted on subdivision. Held: Constitution does not require all members of a board to participate, nor is a participating member required to attend every hearing.
 - Auger v. Town of Strafford, August 23, 2007

Quorum

- The clues from Auger are:
 - Parties may not have a constitutional right to demand a full board for every decision, and
 - Lack of a full board probably does not justify rehearing.
 - However, this is a PB case.
- The clue from Fox is:
 - Provide an opportunity to object to any member prior to a vote, and document the response.

Notice, Open to the Public

- Notice
 - For “Right to Know” purposes, post 24 hours in advance, 2 public places, RSA 91-A; RSA 673:17.
 - For parties, see RSA 676:7, 5 days certified mail
- Open to the Public
 - Open to anyone (not just residents)
 - May take notes, record, photograph, etc.
 - No requirement to post agenda, or to follow one

The Right to Know Law

- Part I, Article 8 of the NH Constitution:
 - Government ... should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.
- A MEETING of a PUBLIC BODY must have PROPER NOTICE and be OPEN TO THE PUBLIC. RSA 91-A:2.

Participation and Minutes

- Participation in the hearing
 - The right to be present (RSA 91-A) does not mean a right to speak, or add documents to the record.
 - RSA 676:7, I(a): applicant and persons “directly affected” shall be heard, others at board discretion.
- Minutes of Meetings
 - Kept and made available within 5 business days (2007 change from 144 hours)
 - Include members present, people participating, summary of subject matter and decisions reached or action taken.

Equitable Waiver of Dimensional Requirements

- A simple remedy for honest mistakes
- Dimensional only, not “use” violations
- A “waiver”, and does not create a non-conforming use
- Future changes must comply with zoning in effect at the time

Equitable Waiver, Elements

- 1. Violation not discovered until after substantial completion
- 2. A “good faith error”, by owner or building official, not ignorance, misrepresentation
- 3. Does not create a “public or private nuisance”
- 4. Cost of correction outweighs public benefit, and thus unfair.

Administrative Appeals

- To resolve claims of **error** in the decisions of:
 - “Administrative Officials” RSA 676:5, II (b)
 - Building Inspector or zoning official
 - Board of Selectmen
 - Planning Board, RSA 676:5, III
 - Historic District Commission, RSA 677:17

Administrative Appeals

- Administrative Officials, exception:
 - Cannot review “discretionary” acts, including refusal to take enforcement action
- Planning Board or HDC, exception:
 - Cannot review decisions involving “innovative land use control” issues

Special Exceptions, RSA 674:33, IV

- A use that is ***permitted*** by the ordinance, subject to additional criteria or standards
- Burden placed on the applicant to show that all of the additional criteria are met
- Runs with the land, but may be subject to conditions to prevent expansion or change, see Rye v. Ciborowski, 111 NH 77 (1971).

What is a Variance?

- A variance serves to **exempt** a property and its use from the application of the zoning ordinance;
- Cannot be granted unless **all five** elements are met;
- The relief “**runs with the land**”, not specific to the applicant.

The Five Elements

- No diminution in the value of surrounding properties
- Not contrary to the public interest;
- Owing to special conditions, a literal enforcement of the terms of the ordinance will result in unnecessary hardship;
- Spirit of the ordinance will be observed;
- Substantial justice will be done

Disability Exception

- A variance may be granted for reasonable accommodations necessary for a physically disabled person to use a property.
- The “hardship” element does not apply
- The variance may be limited to a person, and does **not** run with the land.
 - RSA 674:33, V

Evidence Issues

- The burdens are upon the applicant.
 - Production: There must be evidence in the record to support a finding of fact on each element.
 - Proof: “preponderance of the evidence”
- Formal “rules of evidence” do not apply.
- In the absence of evidence in the record, a decision is likely to be reversed on appeal.

Who Can Ask Questions?

- Through the chair:
 - Members, seeking information needed to make a decision.
 - Parties, seeking to test assertions made by others, including experts.
 - Other persons, including alternates and experts, at the discretion of the board.
- Not formal cross-examination.
 - Goal is to receive a clear presentation, not create traps for the unwary.

Evidence, Who Do We Believe?

- A board may consider its own knowledge of an area, and is not bound to accept an expert's opinion.
 - Vannah v. Bedford, 111 NH 105 (1971)
- However, a board cannot simply ignore “credible and uncontroverted evidence” from an expert.
 - Malachy Glen Associates v. Town of Chichester 155 NH 102 (2007)

Closing the Public Hearing and Moving to Deliberation

- When the chairperson closes the public hearing, the receipt of information is complete.
 - Don't ask questions of parties during deliberation.
 - Don't allow others to pose questions to the board
- If the board chooses to reopen the hearing:
 - Be sure to allow all parties an opportunity to be heard on the additional information.

Ex Parte Contacts

- Meaning: contact between an adjudicator and a party without other interested persons available to hear and participate.
- Prohibited:
 - Exception; procedural questions
 - Rules of procedure reduce the questions
- Use your staff, especially the clerk, to answer these questions.

Why is this a big deal? Examples:

- An applicant finds abutters have lobbied members by phone or e-mail.
- Abutters find that the applicant has discussed the case in detail with members prior to the hearing.
- As a board member, you find that the applicant has asked for relief based upon advice received from the chairperson during a one-on-one meeting.

Deliberations Must Be in Public-

The Right to Know Law

- If deliberating at a different time:
 - Observe the right to know law and deliberate to decision in public, RSA 673:17.
 - Do not allow ex-parte contact with board members in the interim days.
 - Members should not discuss the case between themselves in person, by phone, or by e-mail.

Obtaining Legal Advice During Deliberations

- Consultation with counsel is not a “meeting”.
 - Need not be posted.
 - No minutes are required.
- What if the board meets to review a letter from counsel? Is this “consultation”?
 - Advice from counsel is privileged, not a public record subject to disclosure.
 - But, if the advice or letter is disclosed in public, the privilege may be waived.

“Taking a break” during deliberation

- An issue for the discretion of the board, but:
 - Watch out for ex-parte contacts with applicants or interested persons.
 - Don’t allow members to discuss the case between themselves during the break.
- Misconduct could allow someone to move to disqualify a member, and jeopardize the entire hearing.

Failed Motions?

- Issues for your rules of procedure:
 - Proceeding with an even number of members, effect of a tie vote? Does not pass the motion to approve, since there are not 3 affirmative.
 - Is a failed motion to approve a denial, or just an opportunity for a new motion?
 - Are members allowed to abstain, and does an abstention destroy a quorum?
 - Effect of a failed motion to deny?

Drafting a Motion for Approval

- ZBA relief runs with the land, so take care and be precise.
 - Don't say: "Move to approve a 2 foot variance..."
 - Do say: "Move to grant a variance from section ____ to allow a side setback of 18 ft where 20 ft is required..."
- Not required to grant what the applicant seeks; craft the relief you feel is appropriate.

May we add conditions to the approval?

- Yes, provided that the conditions relate to the use of the land, and not to the person by whom the use is to be exercised.
- If a person undertakes substantial construction or incurs substantial liabilities based upon a variance, the rights become vested.
 - Wentworth Hotel, Inc. v. Town of New Castle, 112 NH 21, (1972)

The Conditions Cannot Delegate Duties to Others

- When considering a special exception, a ZBA approved the relief subject to off site improvements to be completed by the State. Held, this was the same as waiving or varying the terms of the zoning ordinance, and special exception unlawful.
 - Tidd v. Alton, 148 NH 424 (2002)

Conditions Can Send the Applicant Back to Other Land Use Boards

- When a proposal requires both ZBA relief and Planning Board subdivision or site review approval:
 - Who hears the case first? Usually the ZBA, since without their relief, the proposal fails.
 - Whose conditions prevail? The ZBA usually defers most to the Planning Board.
 - These are the cases where joint meetings (RSA 676:2) are most helpful.

Motions & The Elements of a Variance or Special Exception

- Motions should be made in accordance with your rules of procedure.
- We suggest that ZBA's do not take separate votes on each element of a request, but instead create a motion to grant or deny the entire request.
- Why?, the 3 affirmative vote rule of RSA 674:33,III

Example: Was This Variance Granted?

Member	Public Interest	Hardship	Spirit & Intent	Substantial Justice	Diminish Value	All 5 Elements
1	Y	N	Y	N	Y	N
2	Y	N	N	N	Y	N
3	Y	Y	N	Y	Y	N
4	N	Y	Y	Y	N	N
5	N	Y	Y	Y	N	N
Score	3	3	3	3	3	0

Drafting a Motion for Denial

- Again, be careful and precise, to minimize the issues for a Motion for Rehearing.
- Utilize evidence to explain why the required elements are not present, such as:
 - The special exception should be denied because the proposal would create a serious traffic hazard.
- Create the motion to speak to the requested relief, not each of the elements of the relief.

Findings of Fact

- Commentators, including OEP, suggest detailed findings of fact to aid in court review.
- However, the absence of findings is not in and of itself error.
 - Thomas v. Town of Hooksett 153 NH 717 (2006)
- Although, a Superior Court can send a case back if it finds the decision “unclear”.
 - Kalil v. Town of Dummer ZBA, April 19, 2007.

The Written Notice of Decision

- Something in writing is required.
- If a denial, the reasons must be specified.
 - RSA 676:3, I
- The written decision is an opportunity
 - To communicate exactly what relief was granted, or why a request was denied.
 - To create a record for future local officials to use in understanding what relief was granted to an applicant.

It Isn't Over Until it is Over.

- Any decision is subject to request for rehearing for 30 days.
- May be requested by any “person directly affected”, the selectmen or a member of the ZBA.
 - RSA 677:2
- ZBA has inherent authority to reconsider for any reason during 30 day appeal period.
 - 74 Cox St., LLC v. City of Nashua, 9/21/2007.

Procedures for Rehearing

- Board must act within 30 days of receipt of the motion.
- No new notices to parties or abutters are required.
- The Board must consider the Motion (may be more than one) at a public meeting, but this not a continuance of the public hearing.
- The Board should not hear new argument from anyone, not an opportunity to present the case again.

We Granted a Rehearing, Now What do we do?

- The case begins again from the beginning, not just on the issues originally identified in the motion(s) for rehearing.
- All parties must be notified again, who pays for this is often a disputed issue.
- Require all parties to present all information again, a new record is created.
- Base the new decision on the new record.

We Denied a Rehearing, What Happens Now?

- The unhappy party may appeal to Superior Court within 30 days of the decision.
- Be sure to compile and preserve “the record” as completely as possible.
- Requests for information may be made both under the Right to Know Law, and under Superior Court discovery rules.
- Don’t destroy information before consulting town counsel.

Conclusion

- Making an adjudicative decision is difficult.
- Regardless of what decision is made, someone will be unhappy with the result.
- The process is important, the Superior Court will be interested in assuring that the decision was reached fairly.
- Good procedural rules will result in better decisions, and reduced conflict.